IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 65 OF 2003.

Shri Sailesh Shyam Parsekar,
resident of Deulwaddo, Parcem,
Pernem Goa. ..... Applicant.

Versus

1. Baban @ Vishvanath S. Godge,
resident of Deulwaddo,
Korgao, Goa.

2. State of Goa
(Through Public Prosecutor). ..... Respondents

Mr. J.P. D'Souza and Ms. Caroline Collasso, Advocates for the Applicant/Accused.

Mr. R.S. Parsekar, Advocate for the Respondent No.1/Complainant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No.2.

CORAM: N.A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 26.08.2004
DATE OF PRONOUNCING THE JUDGMENT : 2.09.2004

J U D G M E N T:

This revision is filed by the accused in O.A.C. No.62/0/2001.

2. The accused has been convicted and sentenced by the learned J.M.F.C., Pernem by Judgment/Order dated 15/17th April, 2002 under Section 138 of the Negotiable Instruments Act, 1881 to undergo S.I. of one month and to pay compensation of Rs.39,000/- to the complainant and, in default, to undergo S.I. for six months.

3. The said conviction and sentence has been upheld by the learned Addl. Sessions Judge, Panaji vide his Judgment/Order dated 10.11.2003.

4. The case of the complainant was that he had sold to the accused on 19.12.2000 about 240 bags of cement at the rate of Rs.147/- each and the accused gave him a cheque post dated having No. 232360 dated 25.12.2000 towards the payment including transport charges as the accused did not have cash with him.

5. The complainant as per the instructions of the accused, deposited the said cheque in Goa State Cooperative Bank Ltd., but the same was returned unpaid with the remark " "Funds insufficient". The complainant thereafter sent a legal Notice dated 7.6.2001 by Registered A.D. The original of the said Notice was sent at the business address of the accused and a copy of the said Notice was sent to the residential address of the accused, calling upon the accused to pay the amount within 15 days from the receipt of the Notice. But the said Notice s were returned to the complainant with the endorsement: " Unclaimed, return to sender ". The complainant therefore filed the complaint on 30.6.2001 under Section 138 of the Negotiable Instruments Act, 1881 (Act, for short).

6. At the time of hearing of this revision, Shri D'Souza, the learned counsel of the accused, has submitted that the postal articles as per the Rules in force had to be kept in the Post Office for about seven days before they could

be returned to the sender and since in this case the notice/s were not kept for seven days, presumption that the notice was duly served cannot be drawn. In support of the said submission, Shri D'Souza has placed reliance on clause 191/1 of the Postal Manual, Chapter 6 wherein it is stated as follows :-

> " 191/1. Period of detention of parcels in the office of delivery. - The period of detention in the office of delivery of inland parcels (except v.p. Parcels and those addressed to the post restant) prescribed by rule 190(1) must be strictly observed. A parcel should be issued for delivery only once, and if it cannot be delivered through any cause on first presentation by the postman, he should return it to the parcel Asstt. With a brief note regarding its non-delivery. A notice of arrival of the parcel (Form R.P.-65) should then be prepared by the P.A. And made over to the postman for delivery to the addressee at the next delivery. The addressee's receipt for the intimations should be taken on the lower portion of the form which should be detached and pasted in the book of receipts for intimations and notices delivered. If the addressee cannot be found, the notice may be left with a member of his family for a servant accustomed to receive articles of the unregistered letter mail on his behalf, provided that the recepient signs the receipt mentioned above. Should the addressee fail to take delivery of the parcel at the post office within seven days from the date of presentation of the notice, the parcel should on the expiry of that period, be treated as "unclaimed" and be disposed of in accordance with rule 190. The postmaster must, before returning a parcel, satisfy himself (1) that the notice of arrival has been correctly delivered and (2) that the period of detention has already expired. Delivery of the notice duly receipted by the addressee or his agent, and if registered, on the required conditions being fulfilled.

7. To my mind, reliance placed on the said Postal Manual is wholly misplaced. Firstly, there is absolutely no cross-examination carried out on behalf of accused as to the date the registered letter/s were returned to the complainant and/or to his Advocate and without there being any foundation in

cross-examination on that aspect, this submission cannot be accepted. Moreover, the said instructions are for the guidance of the postal employees and not statutory instructions in force which senders of letters are required to follow.

8. The contention that the service of notice was not proper therefore cannot be accepted. The matter of service under Section 138(b) of the Act has been **exhaustively** dealt with by the Supreme Court in the case of **K. Bhaskaran v. Sankaran Vaidhyan Balan and another (1999 S.C.C. (Cri) 1284) .** The Supreme Court stated that the words in clause (b) of the proviso to S.138 of the Act showed that the payee has the statutory obligation to "make a demand " by giving notice. The Supreme Court further observed that the thrust in the clause is on the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice . Once it is despatched his part is over and the next depends on what the sendee does. The Supreme Court further stated that a notice refused to be accepted by the addressee can be presumed to have been served upon him and the notice with endorsement as unclaimed will make no significant difference because of the presumption of S.27 of the General Clauses Act could be profitably imported in a case where the sender has despatched the notice by post with correct address written on it and then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. The accused made no effort during the trial of the case that he was not responsible for non-service of the said notice and both the Courts below have rightly concluded that the requirements of Section 138(b) of the Act were

duly complied by the complainant.

9. Shri D'Souza has next submitted that the recording of statement of the accused under S.313 of Cr.P.C. 1973 has been improper inasmuch as wrong date i.e. 6.6.2000 instead of 6.6.2001 was put to the accused. Shri D'Souza has also submitted that some relevant questions as regards date on which the cheque was deposited was not put to the accused and so also regarding the legal notice. It is the submission of Shri D'Souza that the accused has been greatly prejudiced by not putting the correct date/said circumstances to the accused when he was examined under S.313 of the said Code. Shri D'Souza has placed reliance on the case of **State of Karnataka v. Dashrath and 2 Ors.** (1991 (3) Crimes, 22). Shri D'Souza has also submitted that this is a fit case for remand, so that the accused is given an opportunity afresh to explain all the circumstances appearing against him.

10. The case of **State of Karanataka v. Dashrath and Ors . (supra) was a case** where several circumstances which appeared in the evidence on record and which related to different dates, were included in one question and the explanation of the accused was sought, and, the Division Bench of Karnataka High Court observed that the manner in which the accused was questioned, left much to be desired and the manner in which the accused was examined, in their view, did not afford to the accused a just and fair opportunity to explain the circumstances appearing against him because several distinct matters were mixed up in a single question and some other important circumstances appearing against the accused have not been put to him with specificit.y. The Division Bench therefore thought it fit to send the

case back to the Trial Court for examination of the accused afresh under S.313 of the Code, observing further that Section 313 of the Code provided an opportunity to the accused "personally to explain any circumstance appearing in the evidence against him". The answers given by the accused may be taken into consideration in such trial. With a view to provide a fair opportunity t the accused, the law casts the obligation on the Court itself to frame the relevant questions so that the accused may have an opportunity to explain all circumstances appearing against him. To ensure fairness, the questioning is to be done by the Court without the aid of the Counsel and this at once emphasizes the seriousness of the duty cast upon the Court. The Court must question the accused in relation to all incriminating circumstances appearing against the accused. Even if the accused was present when the witnesses deposed against him, the law still casts upon the Court a duty to marshal the evidence and to cull-out all the incriminating circumstances and question the accused in respect thereof so that the accused may offer his explanation. In a sense, the Court must also be satisfied that the accused has understood the circumstances appearing against him and give whatever explanation he had in regard thereto. The Law Commission in its 41st Report thought that the stage has not yet been reached for the deletion of this provision and may be in future, with better education and better facilities for legal aid this matter may have to be reconsidered in the charged circumstances. As the law stands today, Sec.313 of the Code provides not only the accused an opportunity to explain the circumstances appearing against him, but also the Court an opportunity to have a personal dialogue with the accused to elicit such explanation as he may have to offer, free from the fear of being trapped to make an embarrasing admission or statement or of being led to make any statement

meant to fill up the lacuna in the prosecution case. The questioning by the Court must inspire this confidence in the accused that the questioning is meant for his benefit and not for the benefit of the prosecution. The purpose of the examination of the accused is only to elicit his explanation in regard to circumstances appearing against him and nothing more. "

11. Shri Parsekar, the learned counsel of the complainant, on the other hand, has placed reliance on the case of **Shobhit Chamar and another v. State of Bihar (**A.I.R. 1998 S.C. 1693). This was a case where the plea of non-compliance of Sec.313 of the said Code was taken for the first time in appeal before the Supreme Court and the Hon'ble Supreme Court observed that the challenge to the conviction based on non-compliance of Sec.313 of the Code first time in appeal could not be entertained unless the appellant demonstrated that prejudice has been caused to them and that no prejudice was demonstrated before them and therefore they were unable to accept the contention raised on behalf of the appellant (accused).

12. Coming to the date of the notice as 7.6.2000 being put to the accused when he was examined by the learned J.M.F.C, the learned Addl. Sessions Judge has held, and in my view rightly, that it was a typographical error. As far as the date of deposit of the cheque not being put to the accused when he was examined under S.313, I find that Question No.3 covers the same. In my opinion, all matters relating to bags being taken on credit, issuance of a cheque, its subsequent deposit, its return dishonoured and inspite of that the money not being paid to the complainant, were adequately put to the accused when he was examined under S.313 of the Code. In fact, no

effort has been made on behalf of the Applicant to demonstrate as to what prejudice has been caused to the accused when his case has been one of total denial.

13. A Division Bench of this Court in the case of **Carlos Basilo @ Polly D'Souza v. State** (1995 (2) Crimes 56) has stated that in the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. It is also open to the Appellate Court to call upon the Counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate Court any plausible or reasonable explanations of such circumstances, the Court may assume that no acceptable answer existed and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction. As already stated, the plea of the statement under S.313 of the Code not being properly framed and put to the accused appears to be the last straw caught hold by the accused in order to further delay the consequences which the accused has invited himself by not making the payment of the amount owed by the accused to the complainant.

14. I therefore find there is no merit in this revision petition and, as a result, the same is hereby dismissed.

sl. N. A. BRITTO, J.